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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-371

JAMES VINCENT KEOGH, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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October 29, 1971

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This reply is necessitated by several erroneous impressions created by the opposition memorandum filed by the United States:

1. The timeliness of the petition

Patently in error is the suggestion of the Government (Opp. 3) that the failure to file the petition for certiorari within 30 days from the entry of the judgment below renders the petition untimely. That suggestion is premised on an out-of-context reference to a footnote phrase in *United States* v. *Morgan,* 346 U.S. 502, 505, n. 4 (1954), that speaks of a motion for a writ of error *coram nobis* as a "step in the

criminal case . . ." Hence, the Government argues, the 30-day limitation specified in Rule 22(2) for filing petitions "to review the judgment of a court of appeals in a criminal case" must be deemed applicable.

This is not the first time in this *coram nobis* proceeding that the Government has raised this fallacious time argument. When the appeal was taken from the first *coram nobis* ruling of the District Court (271 F. Supp. 1002), the Government, in reliance on the footnote remark in the *Morgan* decision, urged that the 10-day limitation on the filing of notices of appeal, specified by the then F.R.Cr.P. 37(a)(2), applied so as to make the appeal untimely, the notice having been filed 27 days after entry of the order of dismissal. The Second Circuit rejected the Government's contention, holding that the filing time was governed by the 60-day limitation applicable to civil cases, as then specified in F.R.Civ.P. 73(a). *United States* v. *Keogh,* 391 F.2d 138, 140 (2d Cir. 1968). In so ruling, the Second Circuit stated in language fully applicable here (p. 140):

> "The problem to which the [*Morgan*] footnote was addressed was that F.R.Civ.P. 60(b) had abolished writs of error *coram nobis* in favor of the motion procedure there provided. The answer was that the abolition effected by Rule 60(b) cannot fairly be extended beyond the 'suits of a civil nature' to which alone, under the general provision of Rule 1, the Rules of Civil Procedure apply. We do not read the quoted statement as intending more than that. Indeed the footnote ends by characterizing a motion for *coram nobis* as 'of the same general character as one under 28 U.S.C. § 2255,' which, as indicated above, is under the civil rules as regards time for appeal. See *Heflin* v. *United States,* 358 U.S. 415, 418

> n. 7 (1959). Compare *Wells* v. *United States,* 318 U.S. 257, 260 (1943). The policy considerations supporting prescription of a very short time for appeal in a criminal case are notably absent in *coram nobis.*"

In other words, a writ of error *coram nobis* that is sought to relieve one from the effects of a criminal judgment was viewed in *Morgan* as "a step in the criminal case" solely to distinguish it from a writ of error *coram nobis* involving a civil judgment—where the writ has been abolished by Rule 60(b) of the Federal Rules of Civil Procedure. In all other respects, the *coram nobis* writ in the criminal context is considered to be "of the same general character as . . . [a motion] under 28 U.S.C. § 2255" or a motion for habeas corpus. See *Morgan,* 346 U.S. at 506, end of n. 4.

It is clear, of course, that petitions involving post-conviction collateral proceedings under 28 U.S.C. § 2255 or proceedings in habeas corpus can be considered as steps in a criminal case; yet they are "civil" cases within the meaning of this Court's filing time requirements, so that the 90-day time limit prescribed for civil cases, rather than the 30-day limit of Rule 22(2), applies. *Heflin* v. *United States,* 358 U.S. 415, 418, n. 7 (1959); and see Stern and Gressman, *Supreme Court Practice,* Sec. 6.1, p. 240 (4th ed. 1969). The close similarity between *coram nobis* and the habeas corpus and § 2255 actions, as recognized in *Morgan,* makes inescapable the conclusion that the *coram nobis* petition is also subject to the 90-day filing time limitation in this Court. And it would thus follow that the instant petition was timely filed, it

having been filed within the additional 60-day extension properly granted by Mr. Justice Harlan.

Since the Government seems repeatedly confused by the *Morgan* footnote reference, it might be appropriate for the Court to clarify the matter, as above suggested, should certiorari otherwise be granted herein.

2. The appropriateness of granting certiorari

The Government has sought to oppose certiorari by largely ignoring the certiorari considerations set forth in the petition and by contenting itself with such erroneous assertions as that "petitioner had not urged any claim which involved the resolution of a factual dispute" (Opp. 9) and that the petitioner's claim respecting the standard for *coram nobis* relief "is not fairly presented in a factual situation where, by any reasonable standard, no relief is warranted" (Opp. 8).

To begin with, the Government has not denied the existence of differences, stemming from decisions of this Court and of other Circuits, as to the proper standard to be applied to an application for *coram nobis* relief. See Pet. 21-30. Nor has the Government denied the appropriateness of resolving and clarifying that problem. What is now important is the fact that "by any reasonable standard" petitioner would clearly be entitled to relief. Significantly, the Government by its silence virtually concedes that under the *Griffin* standard (336 U.S. at 709), it would be "too dogmatic on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." Such evidence here consisted of the proof of a suspicious cash

deposit by Forman (a named co-conspirator) of some $33,350, consisting of over 600 bills, which was used to finance the Ace investment—rather than to make any bribe payments.[1] On the present state of the record there does not appear to have been sufficient money available to the co-conspirators to have made both the Ace investment (which was documented in the FBI report) and the payment of the alleged bribe. In these circumstances, the jury, or any one of its members, might well have attached significance to this exculpatory evidence as to the Ace investment and concluded that a reasonable doubt did indeed exist whether petitioner received any money.

Yet even under the Second Circuit's dubious standard, which was discredited by the majority of this Court in *Morgan* (see Pet. 23-25), petitioner might have been able to demonstrate that "he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror" had he been accorded the evidentiary hearing to which he was entitled as a matter of right and been given the chance to develop all pertinent facts. Contrary to the Government's undocumented assertion (Opp. 9), the claim as to the suspicious bank deposit did "involve the resolution of a factual dispute." The petitioner has vigorously contended that the factual information in the FBI report warranted the conclusion that the alleged bribe money actually went to finance the Ace investment, a contention the Government has consistently denied. The Government obviously felt that this claim of the petitioner was so substantial as to warrant

[1] The FBI report of February 26, 1962, stated that Forman had refused to reveal the source of this deposit.

its own extensive factual investigation, and it obtained two lengthy adjournments of the *coram nobis* proceeding for that purpose. While the Government represented to the District Court that much evidence had already been uncovered in that investigation, none of that evidence was ever revealed.

Thus there exists an unresolved factual dispute of the first magnitude. What was the real source of the 600 bills that constituted this bank deposit? Was there sufficient money sent to Moore from the English company to make both the Ace investment and the bribe payment?[2] Was the bribery money actually diverted at the last moment into the Ace investment? The Second Circuit's opinion does not even purport to answer those questions, for the record has not been sufficiently developed.

The Government's ultimate reliance (Opp. 9) on the Second Circuit's erroneous statement that neither party requested an evidentiary hearing[3] serves only to underscore the importance of the question as to the applicant's absolute right to an evidentiary hearing where serious factual questions are at stake. See Pet. 30-33. No authority can be cited to the effect that a formal request for such a hearing is an es-

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[2] In requesting a hearing, the Government represented that it would receive financial records of the English company so as to document the source of the Forman bank deposit. But the Government never revealed what those records demonstrated. See Pet. 32, n. 14.

[3] See Pet. 31, n. 14, from which it is apparent that the Government did request a hearing and that the petitioner sought such a hearing as alternative relief. The Second Circuit stated that it had "contemplated" an evidentiary hearing.

sential predicate. It would appear from the *Morgan* decision, 346 U.S. at 512-513, that in cases where there are unresolved factual disputes pertinent to the right to relief, the motion for *coram nobis* relief "*must* be heard by the federal trial court," inasmuch as the applicant "*is entitled* to an opportunity to attempt to show that his conviction was invalid." (Emphasis added.)

Various other misstatements in the Government's brief need not here be corrected, with one exception. That the trial itself was a close case, making the newly uncovered evidence of possibly decisive importance, is not merely the opinion of "petitioner and present defense counsel (who were not participants at trial)." Opp. 7. Whatever the trial judge's present recollection may be (Pet. App. 49a), the Second Circuit on direct review of the original conviction in 1963 found that the case was indeed a close one. Thus that court held that "there is a sharp conflict in the evidence and the Government's case depends in large part on the testimony of persons who admit guilt of the crime with which the other defendants are charged." 317 F. 2d at 467. And it further commented that careful review was necessary in this case "where there was such real basis for the existence of reasonable doubt and the consequences of a wrong verdict are so tragic." 317 F. 2d at 485. Against the background of such a close trial, the addition of the new evidence might well have tipped the scales for petitioner in the minds of conscientious jurors.

CONCLUSION

For these additional reasons, supplementing those in the petition, certiorari should issue to review the judgment and opinion of the Second Circuit.

Alternatively, because petitioner's right to an evidentiary hearing is so absolute in these circumstances, it may be appropriate to grant certiorari, vacate the judgment of the Second Circuit, and remand the matter to the District Court with directions to hold an evidentiary hearing on the instant *coram nobis* application.

Respectfully submitted,

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